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93-730

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,

Petitioners.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

Whether prisoners who perform labor or render services in connection with programs operated and maintained under the authority of California's Prison Industry Authority are entitled to payment for their work at the minimum wage rates established under the Fair Labor Standards Act, 29 U.S.C. section 201 et seq.

LIST OF PARTIES

Petitioners are the defendants in Jernigan v. Prison Industry Authority et seq., No. CIV-S-92-1408 GEB PAN, an action under the FLSA for damages, declaratory and injunctive relief and back wages filed in the U.S. District Court, Eastern District of California. The second amended complaint in this District Court action was filed on April 1, 1993. Plaintiff Jernigan, the real party in interest in the instant petition, is an inmate employed by petitioner Prison Industry Authority and represented by counsel.

Petitioners are the state of California defendants in the lower court action. They are the State of California; the Prison Industry Authority; the Prison Industry Board; James Gomez, in his official capacities as Director of Corrections and Chairman, Prison Industry Board; David King, General Manager of the Prison Industry Authority; Joella Fazio, Executive Officer of the Prison Industry Board; and 50 Does.

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Petitioners Prison Industry Authority, et al., pray that a writ of mandamus issue to review the August 27, 1993 order of the United States District Court for the Eastern District denying petitioners' motion to dismiss plaintiff's FLSA complaint upon the authority of Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II].

OPINIONS BELOW

The Eastern District opinion is unpublished and is contained in the appendix of this petition.

JURISDICTION

The jurisdiction of this court to review the Eastern District order is discretionary and authorized by 28 U.S.C. section 1651(a).

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 29 U.S.C. section 201 et seq., and in particular the following:

> [Section 203(b).] "Commerce" means trade, commerce, transportations, transmission, or communication among the several States or between any State and any place outside thereof.
>
> Section 203(d).] "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . . .
>
> [Section 203(e)(2)(C).] In the case of an individual employed by a public agency, ["employee"] means any individual employed by a State, political subdivision of a State, or an interstate government agency, other than [non-civil service employees, or elected or appointed officials, or advisors to office-holders.]
>
> [Section 203(g).] "Employ" means to suffer or permit to work.
>
> [Section 203(i).] "Goods" means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but

does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.

[Section 203(j).] "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

[Section 206(a).] Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, [the minimum wage declared by Congress.]

STATEMENT OF THE CASE

The instant petition comes before this Court after denial of petitioners' motion to dismiss the inmate plaintiff's April 1, 1993 second amended complaint for FLSA relief. In lieu of an answer, petitioners, the

defendants in the action, filed a motion to dismiss the action on January 20, 1993 and subsequent briefing with respect to the second amended complaint. Petitioners' motion was premised upon Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II].[1/]

The Eastern District ruled on the motion on August 27, 1993.[2/] In pertinent part, the lower court held:

> [Petitioners] fail to establish that the applicable California statutes create, as a matter of law, a relationship between Plaintiffs and the California prisons which is analogous to the hard labor requirement in [Hale II]. Moreover, Plaintiffs make an offer of proof that they will be able to show that their participation with the Prison Industries is voluntary, rather than

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1. The inmate plaintiff in Hale sought a petition for certiorari. The petition was denied certiorari on November 1, 1993. Hale v. Arizona, No. 93-353. On October 4, 1993, this Court denied certiorari in Harker v. State Use Industries, No. 93-5298, a case involving issues similar to Hale. See Argument I(C), infra.

2. The motion was consolidated for motion hearing only with another similar case, Burleson v. Prison Industry Authority, No. CIV S-93-200 GEB PAN. The instant petition concerns the Jernigan case only because consideration of the two cases would add nothing to the discussion of the relevant legal issues.

> a condition of confinement. [Petitioners'] motions to dismiss are, therefore, denied and Plaintiffs may develop a factual record in their cases.

Appendix, Order at 2.

On September 7, 1993, petitioners filed a request for a 28 U.S.C. section 1292(b) certification of the denial for appeal. That request is pending before the Eastern District, although petitioners received a very strong impression at the October 24, 1993 hearing on the motion that the request would be denied. Petitioners are awaiting the denial and will transmit a copy of that denial to this Court when they receive it. In addition, the transcript of the certification hearing has been ordered and will be presented to this Court as soon as it is received.

STATEMENT OF FACTS

In the instant case, inmate Jernigan, the plaintiff, filed his second amended complaint on April 1, 1993. The complaint was filed on behalf of inmate Jernigan and other similarly situated inmates confined within the California Department of Corrections. Plaintiff alleged that he was employed by the Prison Industry Authority and that he was paid less than the minimum wage prescribed by the FLSA. Plaintiff sought declaratory and injunctive relief as well as back wages and damages for himself and other similarly situated inmates.

STATEMENT OF NECESSITY FOR EXTRAORDINARY RELIEF

This case involves an issue of immense importance for the administration of justice in the several states and within the Federal correctional system. Each state and the federal correctional system utilizes inmates as workers in various prison industries. The circuits are split as to whether these workers are accorded the minimum wage under the FLSA and therefore there is no national interpretation of the fundamental law governing pay for workers in the United States.

Within the Ninth Circuit alone, there has been unusual uncertainty as to this point of law. Within the two years from 1991 to 1993, the Ninth Circuit has issued an opinion holding that inmates need not be paid the minimum wage; reversed itself in 1992; and upon rehearing of the 1992 case, issued a compromise opinion which seems to partake of both sides in this debate on minimum wages. Examination of the 1993 opinion (Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993) [Hale II] shows that it answers nothing about the fundamental applicability of the FLSA to prison inmates. The opinion simply does not provide any legal criteria for determining whether an inmate must be paid the minimum wage. Inmate Hale has sought certiorari and his petition is presently pending before this Court. Hale v. Arizona, No. 93-353.

The parties to the litigation in the lower court and all inmate plaintiffs and government attorneys with cases pending in state and federal trial courts have a common

desire to know the applicable law before they begin discovery in their cases. The instant litigation, being a class action, will surely require the infusion of substantial sums for discovery for both sides. These expenditures would be simple economic waste if this Court renders a definitive decision after the termination of the litigation.

The numerous conflicting decisions and the sheer number of new decisions on this point are a sure indicator that this Court must intervene soon and end the confusion which is rampant in the trial courts of this nation. While petitioners have sought certification of the order issued by the Eastern District, this is a discretionary act. Moreover, even if certification is issued, the Ninth Circuit decision will not be had within nine months or more and in any case that Circuit is of several minds, a fact evidenced by its last three decisions on point. Finally, although a Senate bill is pending hearing at this point in time, its passage is uncertain.

Petitioners do not seek relief in the form of a writ directing the lower court to certify the issue for appeal. Indeed, because the lower court has not yet formally ruled on the certification motion, this petition might be deemed premature on that ground. Moreover, redirecting the Ninth Circuit, in effect, to reexamine the instant case in light of Hale provides no adequate relief for petitioners because of the confused state of the law among the circuits. Petitioners also respectfully suggest that a reading of Hale and Jernigan together indicates that there is no certainty within the Ninth Circuit as to the governing law.

Instead, petitioners request extraordinary relief in the form of a hearing before this Court to finally decide the legal issues raised in Hale and the other cases cited herein in order to prevent the cost and waste of judicial resources in prosecuting a case where there is no consensus as to the interpretation of the relevant law, either in the Ninth Circuit or across the nation. No matter who wins the case at trial, appeal of the decision to the Ninth Circuit is inevitable. After the Ninth Circuit resolution, perhaps two years from now, this Court will still have to decide the precise legal issue presented in this petition. Surely if mandate serves a purpose, it is to prevent this sorry projected history of delay and irresolution.

ARGUMENT

THIS COURT MUST ISSUE A WRIT OF MANDAMUS TO PREVENT BURDENSOME DISCOVERY AND DELAYED TRIAL IN A FLSA MINIMUM WAGE CASE FOR WHICH THERE IS NO CONSENSUS AS TO THE APPLICABLE LAW

The key relevant provision of the FLSA are section 203 and 206 of Title 29, U.S. Code. The principal definitions are:

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . .[Certain exceptions which do not apply to inmates are listed.]
>
> (g) "Employ" means to suffer or permit to work.
>
> (i) "Goods" means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include

> goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; . . . an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Section 206 states that the minimum wage shall be paid by an employer to an employee if the employee is engaged in commerce or the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce. Thus any employee, inmate or not, must be engaged in commerce as defined in section 203 in order to claim the minimum wage.

Despite the clarity of basic concepts explicit in these definitions of terms, there is no consensus as to when inmates must be paid the minimum wage if they work within the prison system. The underlying circumstances of this case are undisputed in the record, as the sole pleading in the record is the complaint. Therefore, the instant case provides an ideal context for resolution of the

instant legal dispute. Nearly every federal court in the land has said its piece on this subject, with the Ninth Circuit having issued three conflicting opinions on the point in a two-year time period.

There is simply no unanimity on this issue and this Court must undertake to provide an answer to the uncertainty in the area. The courts of the nation, in the absence of any explicit Congressional expression of opinion as to whether inmates are covered by the FLSA, have created a morass of cacophonic tests, criteria and opinion resulting from the piecemeal litigation on this issue. The fate of the principal prison rehabilitative programs in every state cannot be left suspended until the underlying case wends its way from trial court to Ninth Circuit to this Court.

A. THE SPLIT AMONG THE CIRCUITS.

1. Ninth Circuit Case Law.

The Ninth Circuit law leading to Hale II is a checkered one. One panel of the Ninth Circuit issued Gilbreath v. Cutter Biological, Inc., 981 F.2d 1320 (9th Cir. 1991), an opinion consistent with the Hale II decision. However, the 1992 Hale I decision (Hale v. Arizona, 967 F.2d 1356 (9th Cir. 1992)) contradicts Gilbreath. Moreover, the Hale II decision was an en banc 11 to 2 decision. The minority within the Ninth Circuit who believe that Hale I was correctly decided remain unconvinced as to the wisdom of Hale II. See Hale, 993 F.2d at 1389.

Indeed, the confusion inherent in this sequence of cases was evident even prior to the issuance of Hale II. In Morgan v. MacDonald, __ F.Supp.__, 1992 U.S. Dist. LEXIS 14463 (D.Nev. 9/14/92), the District Court summarized the situation:

> In Gilbreath, . . . Judge Trott, writing for the plurality, concluded that inmates never can be employees under the FLSA. . . In a concurring opinion, Judge Rymer refused to decide whether inmates are precluded from [being employees]. . . In a dissenting opinion, Judge D.W. Nelson concluded that inmates are employees. . . Thus, after Gilbreath, one judge believed that inmates are not employees under the FLSA, one judge believed that inmates are employees . . . , and one judge refused to address the issue.
>
> In [Hale I], Judge Nelson, writing for the majority, was joined by Judge Pregerson in her conclusion that the FLSA protects inmates as employees. Further, even though Judge Fletcher dissented, she implicitly agreed that the FLSA applies to inmates . . . Consequently, considering Gilbreath and Hale, three judges believe that inmates are covered by the FLSA, one judge believes the opposite, and one judge has not addressed the issue.

In Morgan, the District Court followed the Hale I decision and after an examination of the economic realities of the

situation, found that no minimum wage was to be paid. Id. at 14462-3. Given the dictates of Hale II, Morgan is incorrect because it utilizes the economic realities test. See Hale, 993 F.2d at 1394.

This internal division would seem to have been resolved by Hale II decision. However, the framing of the instant case by counsel and this court's denial of the motion to dismiss indicate that substantial legal questions remain. Hale II states that: "[W]e are constrained not to hold as a matter of law that prisoners may never be 'employees' of a prison." Hale, 993 F.2d at 1393. The Eastern District, in interpreting Hale upon petitioners' motion to dismiss in Jernigan, has taken another step and ruled that those inmates, if any, who are not "at hard labor", may be "employees" under the FLSA. Appendix at 2.

The instant motion to dismiss in Jernigan is not based on any substantial holding set forth in Hale II; rather, it is the lower court's deduction from Hale's refusal to absolutely bar application of the FLSA and the fact that Arizona inmates are "at hard labor". Suffice to say, the Ninth Circuit never considered California's penal statutes and regulations at all. Despite Hale, there is a substantial legal question relating to whether "hard labor" is a factor of relevance and whether the California law directs "hard labor" because Hale does not address these issues.

There is a substantial legal question as to whether Hale II is correct. Hale seems to be a compromise decision which does not bar all inmates from FLSA

coverage yet does not specify the relevant and sufficient conditions which will trigger coverage. As such, it is but one decision among the numerous circuit court decisions which conflict with each other. The present state of the law is at best confused, with new opinions constantly being issued. See Hale, 993 F.2d at 1393.

Hale and Jernigan do not deal with definitions of "commerce" or "goods". They deal with definitions of "employee" and "unfair competition". This can be shown by an examination of a principal case, Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992). Vanskike deals with an inmate who was performing janitorial and kitchen helper duties directly for the institution. The court held that the inmate was not covered by the FLSA, stating:

> Because status as an "employee" for purposes of the FLSA depends on the totality of circumstances rather than any technical label, courts must examine the "economic reality" of the working relationship.

The court noted that prisoners are not categorically excluded from coverage and that where inmates were employed by entities deemed private enterprises under state law, the terms of employment were crucial. Where the inmate worked directly for the institution, that institution's control over the inmate does not stem from any remunerative relationship or bargained-for exchange of labor for consideration. Therefore, the inmate could not be an employee.

Vanskike also considered whether cheap prison labor constituted unfair competition, noting that if it were, those who provided simple labor would also be entitled to the minimum wage if they were employees.

> For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job-someone who would have to be paid $4.25 an hour.

The court found that simple inmate labor was not unfair competition, the ultimate evil the FLSA was designed to combat, although it implicitly found that such labor was "commerce" under the FLSA.

> For the government, competition in the marketplace is not a dominant mode and profits are not the ultimate goal. A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity.

Therefore, Vanskike states that if governmental participation in a market is not for profit, the FLSA does not apply. This relates to Hale and Jernigan in that both of these cases seem to say that if an inmate is not providing work "at hard labor", then it must be covered by the FLSA. The gap between the two lines of cases is enormous. Under Vanskike, proof of "for-profit" inmate activity is required; under the other cases, proof of "non-hard" labor is required.

Obviously, because there is no Supreme Court case on the subject, no one can predict which test applies especially after the Jernigan denial. Assume an on-site prison facility produces T shirts for inmate use. If the California laws and regulations do not require that an inmate produce the shirts at hard labor, then under Hale and Jernigan there is a substantial possibility that minimum wages are required. Under Vanskike, unless there is a regulation or statute which states as a matter of law that the shirts are produced for profit, or there is a factual situation[3/] which shows that a profit is produced,

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3. Beyond the issue of basic definitions of "employee" and "unfair competition", there is the issue of whether any product is in "commerce", i.e. whether the product comprises "goods". Whether an employee is engaged in commerce is an issue determined on a case by case basis. Coverage under the FLSA depends on the special circumstances of the particular business involved. The Supreme Court has recognized that the Act's purpose is "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." Overstreet v. North Shore Corp., 318 U.S. 125, 128 (1943); Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943). The Act is to be interpreted broadly and guided by practical considerations. Id.; Brennan v. Wilson Building, Inc., 478 F.2d 1090 (5th Cir. 1973), cert. den. 414 U.S. 855. No de minimus rule applies to the Act. Any regular contact with commerce, no matter how small, will result in coverage. Mabee v. White Plains Pub. Co., 327 U.S. 178 (1946). The key question is whether the work of the employees is actually in commerce or is so closely related to the movement of commerce that it is for practical purposes a part of it rather than an isolated local

no minimum wage need be paid. In short, no one can say which particular products are exempt from the minimum wage because the law is unclear as to what, in general, will trigger the minimum wage.

B. CASE LAW REGARDING INMATES EMPLOYED BY NON-PRISON EMPLOYERS.

Complementing the confusion in law within the Ninth Circuit are the other circuit cases dealing with FLSA coverage of inmates who are not directly employed by their prisons or by the relevant prison industry system are covered. See Annotation, 110 ALR Fed 839 (1992). These cases represent the situation in which it is most likely that inmates would be paid the minimum wage, i.e. where the inmates are working for unrelated enterprises. Three groups of cases appear. The first holds there was no congressional intent to have inmates covered by the FLSA. Alexander v. Sara, 721 F.2d 149 (5th Cir. 1983); Worsley v. Lash, 421 F.Supp. 556 (N.D. Ind. 1976), but see Woodall v. Partilla, 581 F.Supp. 1066 (N.D. Ill. 1984); see Sims v. Parke Davis & Co., 453 F.2d 1259 (6th Cir. 1971), cert. den. 405 U.S. 978.

Another line of cases held that inmate's hard labor belonged to the prison and the FLSA did not apply. Miller v. Dukakis, 961 F.2d 7 (1st Cir. 1992), cert. den. 113 S.Ct. 666; Hudgins v. Hart, 323 F.Supp. 898 (E.D. La.

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activity. Mitchell v. Vollmer & Co., 349 U.S. 427 (1955).

1971); Huntley v. Gunn Furniture, 79 F.Supp. 110 (D. Mich. 1948); Worsley v. Lash, supra; Lavigne v. Sara, 424 So.2d 273 (La. 1982).

A contrary line of cases holds that the FLSA's goals were compatible with coverage of inmates. Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984); Watson v. Graves, 909 F.2d 1549 (5th Cir. 1990). These cases in general propose criteria for the analysis of when the FLSA does apply to prisoners. Most acknowledge the "economic reality" test. Sims v. Parke Davis & Co., supra; Woodall v. Partilla, supra; Prieur v. D.C.I. Plasma, 726 P.2d 1372 (Nev. 1986). Civilly committed juveniles have been held to be entitled to minimum wages (King v. Carey, 405 F.Supp. 41 (W.D. N.Y. 1975) while INS detainees have been found ineligible for minimum wages. Alvarado Guevara v. INS, 902 F.2d 394 (5th Cir. 1990).

C. CASE LAW DEALING WITH EMPLOYMENT BY PRISONS OR PRISON INDUSTRIES.

The following cases deal directly with the issue of whether inmates employed in prison industries are due the minimum wage. In Harker v. State Use Industries, 1993 U.S. App. LEXIS 5905 (4th Cir. 1993), cert. den. __U.S. __ (Oct. 4, 1993), the Fourth Circuit found that the FLSA did not apply to inmates employed at a prison workshop located within the penal facility. The court held that the inmates were working in the prison industries "not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training." There was no bargained-for exchange of labor for economic gain, and

indeed the essence of the inmate-industry relationship was custodial. Finally, the inmates had no credible claim to a minimum wage because the institution provided the necessities of life and the inmates did not have to have a minimum wage to insure that they could purchase these necessities. Finally, the passage of the Ashurst-Sumners Act was found to indicate that Congress had no intention to cover inmates when it enacted the FLSA. The Ashurst-Sumners Act criminalizes the transportation of prison-made goods where to do so would threaten fair competition. See also Franks v. Director, __F.2d__, 1993 U.S. App. LEXIS 26863 (10th Cir. 1993).

In Sprouse v. Federal Prison Industries, 480 F.2d 1 (5th Cir. 1973), cert. den. 414 U.S. 1095, Vanskike v. Peters, 974 F.2d 806 (7th Cir. 1992), George v. Badger State Industries, 1993 U.S. Dist. LEXIS 10242 (W.D. Wisc. 1993), and Emory v. U.S., 2 Cl. Ct. 579 (1983), a similar result was reached. On the other hand, as noted in section a(1) supra, Hale squarely holds that FLSA employment within prison industries is possible for inmates.

This sampling indicates the hopeless state of affairs prevailing throughout the county. Given the conflicting circuit opinions, this Court must issue a final decision on the legal issue.

D. LEGISLATIVE REMEDIES.

Pending in the Labor Committee of the U.S. Senate is S. 1115 (Reid, Nev.) which amends sections 202 and

213 of the FLSA to exclude inmates from coverage under the FLSA. At the request of Senator Reid, the General Accounting Office prepared a report on prisoner labor. GAO, Prisoner Labor-Perspectives on Paying the Federal Minimum Wage (GPO, May 1993). The report reviews the prison industries in Arizona, Florida, Nevada, and Virginia, and the federal prison industry system. The "Results in Brief" section of this report states:

> If the prison systems we visited were required to pay minimum wage to their inmate workers and did so without reducing the number of inmate hours worked, they would have to pay hundreds of millions of dollars more each year for inmate labor. Consequently, these prison systems generally regarded minimum wage for prisoner work as unaffordable, even if substantial user fees (e.g., charges for room and board) were imposed on the inmates.
>
> Prison systems officials consistently identified large-scale cutbacks in inmate labor as a likely and, in their view, dangerous consequence of having to pay minimum wage. They believed that less inmate work means more idle time and increased potential for violence and misconduct. They also noted other potentially adverse consequences for prison operations (e.g., routine maintenance performed less frequently) and generally saw few advantages to paying minimum wage.

> On the other hand, some of the organizations we visited had a different perspective on inmate pay, based on the idea that prison work experiences should be more like those in the general public. Minimum or prevailing wages are a part of the "factories with fences" concept that many criminal justice, private industry, and other officials supported in the 1980's. That concept called for improved inmate work and training opportunities by (1) making greater use of prison industries, particularly those operated by the private sector, and (2) operating the industries under normal business and pay practices. Some organizations also believed that by not paying inmates minimum or prevailing wages, prison industries gain an unfair competitive advantage and/or displace workers who are not imprisoned.

Id. at 2.

At best, the prospect for congressional resolution of the relevant legal issues appears problematic. It appears that after a hearing on S. 1115 in the Senate Labor Committee on October 28, 1993, that there will be no further advancement of the bill. In any case, this court should not defer to Congress where the fundamental legal issues are of such pressing urgency and where the best efforts of our intermediate appellate courts have only created confusion.

CONCLUSION

Extraordinary relief must be granted by this Court to reconcile a split among the circuits as to the law; to prevent needless waste in class action discovery and trial if the lower court proceeds without certification of an appeal; and to rule on a matter of national importance.

Petitioners desire a resolution from this Court. This Court will ultimately have to consider the issue and the Ninth Circuit has already issued three opinions on the subject. The piecemeal approach to this FLSA issue has resulted in many opinions in the Ninth Circuit and the rest of the nation and produced no certainty. At this point, stare decisis amounts to a failure of the system.

DATED: November 4, 1993

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

(FILED 8/27/93)

GALVIN BURLESON, et al., Plaintiffs, v. THE STATE OF CALIFORNIA and the PRISON INDUSTRY AUTHORITY, Defendants.	CIV S-93-200 GEB PAN ORDER
GARY V. JERNIGAN, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants.	CIV S-92-1408 GEB PAN

Defendants' move to dismiss plaintiffs' claims under the Fair Labor Standards Act in each of the

above related cases relying upon the Ninth Circuit's decision in *Hale v. State of Arizona*, _F.2d_ (1993). In that case, the Ninth Circuit found that Arizona statutes required prisoners to perform hard labor as a punishment during their incarceration. Defendants fail to establish that the applicable California statutes create, as a matter of law, a relationship between Plaintiffs and the California prisons which is analogous to the hard labor requirement in *Hale*. Moreover, Plaintiffs make a offer of proof that they will be able to show that their participation with the Prison Industries is voluntary, rather than a condition of confinement. Defendant's motions to dismiss are, therefore, denied and Plaintiffs may develop a factual record in their cases.

Jernigan v. Gomez is before the court on Findings and Recommendations of Magistrate Judge Hollows, having been referred to Magistrate Judge Hollows pursuant to 28 U.S.C. § 636 and E.D. Cal. Rule 302. Magistrate Judge Hollows recommended that the *Jernigan* Plaintiffs' claim under 42 U.S.C. § 1983 be dismissed. The *Jernigan* Plaintiffs did not object to that recommendation and indicated at the hearing on this matter their nonopposition to the dismissal of their § 19 83 claim. Therefore, the *Jernigan* Plaintiffs' claim under 28 U.S.C. § 1983 is dismissed. Dismissal of this claim completes the purposes for which this case was referred to the Magistrate Judge. Therefore *Jernigan v. Gomez*

shall now be designated an action under the Fair Labor Standards Act rather than a prisoner civil rights case.

IT IS SO ORDERED.

DATED: August 26, 1993

/s/ Garland E. Burrell

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT
JUDGE

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On November 5, 1993, I served the attached **Petition for Writ of Mandamus to the United States District Court, Eastern District of California** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

RICHARD W. NICHOLS
McDonough, Holland & Allen
555 Capitol Mall, Ninth Floor
Sacramento, CA 95814

Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 5th day of November, 1993.

Rosalind Zender
Notary Public in and for said
County and State

ROSALIND ZENDER
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SACRAMENTO
My Commission Expires March 14, 1995